IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

FRANCES BLAYLOCK V. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for McMinn County
No. 90-1214 James C. Witt, Sr., Judge by Designation

No. E1999-00570-CCA-R3-PC - Decided
May 4, 2000

In this appeal, the petitioner, Frances Blaylock, challenges the dismissal of her petition for post-conviction relief by the McMinn County Criminal Court. Specifically, the petitioner challenges the post-conviction court's conclusion that her trial counsel rendered effective assistance in presenting her defense to charges of conspiracy to commit first degree murder and first degree murder. The petitioner was convicted of both offenses and sentenced to life imprisonment. On direct appeal, this court affirmed the petitioner's convictions and sentences. State v. Blaylock, No. 152, 1988 WL 99958 (Tenn. Crim. App. at Knoxville, September 30, 1988), perm. to appeal denied, (Tenn. 1988). Following a review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is affirmed.

OGLE, J., delivered the opinion of the court, in which WADE, P.J., AND TIPTON, J., joined.

Julie A. Rice, Knoxville, Tennessee, for the appellant, Frances Blaylock.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Jerry N. Estes, District Attorney General; William W. Reedy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The facts underlying the petitioner's convictions of conspiracy to commit first degree murder and first degree murder are set out in some detail in this court's opinion in Blaylock No. 152, 1988 WL 99958, at **1-2. In short, in 1985, the petitioner separated from her abusive husband, Lee Roy Blaylock, and initiated divorce proceedings. Id. at *1. Subsequently, the petitioner and an acquaintance, Robert Christian Smith, developed a plan to murder Mr. Blaylock. Id. In accordance with this plan, the petitioner and Smith drove to Mr. Blaylock's farmhouse late at night. Id. While Smith positioned himself behind a tree in front of the house, the petitioner lured her husband outside. Id. When Mr. Blaylock stepped outside his house, Smith killed him with a single shotgun blast. Id.

II. Post-Conviction Proceedings

On December 4, 1990, the petitioner filed the instant petition for post-conviction relief in the McMinn County Criminal Court. The petition was amended by counsel on February 11, 1991, and on December 7, 1996.[1] Subsequently, on January 28, 1997, the court dismissed the petition on the ground that the petition failed to "raise any question or grounds other than those raised or should have been raised upon the appeal of the conviction in the original case." The petitioner appealed the court's dismissal and, on July 9, 1998, this court reversed the post-conviction court's judgment and remanded the case for consideration of the petitioner's claim of ineffective assistance of counsel. Blaylock v. State, No. 03C01-9706-CR-00217, 1998 WL 379976 (Tenn. Crim. App. at Knoxville, July 9, 1998). In accordance with this court's opinion, the post-conviction court conducted a hearing on April 16, 1999, and, on May 27, 1999, again dismissed the petition, concluding that the petitioner had failed to establish the allegations in her petition by clear and convincing evidence.

The petitioner now brings this appeal, alleging that her trial counsel was ineffective (1) in failing to adequately pursue at trial the "battered woman defense;" (2) in failing to adequately preserve this issue for purposes of subsequent appeals; and (3) in failing at the petitioner's trial to call witnesses to rebut the testimony of the petitioner's daughter concerning incriminating statements made by the petitioner or, alternatively, recall the daughter to the witness stand.

III. Analysis

We initially note that, because the petitioner filed her petition for post-conviction relief prior to the enactment of Post-Conviction Procedure Act of 1995, the petitioner bears the burden of proving the factual allegations in her petition by a preponderance of the evidence. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Additionally, the findings of fact of the post-conviction court are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence in the record preponderates against those findings. Henley v. State, 960 S.W.2d 572, 578-579 (Tenn. 1997); Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). That having been said, in State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999), our supreme court observed that "the issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ." In other words, this court reviews de novo the post-conviction court's determination (1) that counsel's performance was within the range of competence demanded of attorneys in criminal cases, Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), and (2) that any deficient performance did not prejudice the petitioner. Strickland v. Washington, 466 U.S. 668, 687-697, 104 S.Ct. 2052, 2064-2069 (1984). See also Henley, 960 S.W.2d at 579-580; Powers v. State, 942 S.W.2d 551, 557 (Tenn. Code. Ann. 1996). This court need not address these inquiries in any particular order or even address both if the petitioner fails to meet her burden with respect to one. Henley, 960 S.W.2d at 580.

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[1]Meanwhile, the petitioner filed, pro se, another petition for post-conviction relief on September 30, 1992. On December 1, 1992, the post-conviction court summarily dismissed this second petition on the ground that the applicable statute of limitations had expired. This court affirmed the post-conviction court's judgment on December 16, 1993. Blaylock v. State, No. 03C01-9310-CR-00183, 1993 WL 523664 (Tenn. Crim. App. at Knoxville, December 16, 1993).

Again, the petitioner initially alleges that her trial counsel rendered ineffective assistance of counsel by failing to adequately pursue the defense of battered wife syndrome and by failing to adequately preserve this issue for purposes of appeal. At the post-conviction hearing, the petitioner testified that counsel originally planned to present a defense based upon battered wife syndrome. However, trial counsel changed his strategy shortly before trial and relied instead upon a defense of temporary insanity due to repeated and severe spousal abuse. Trial counsel also testified at the post-conviction hearing and explained that, prior to the petitioner's trial, the court set a deadline for the written disclosure of expert witnesses. Prior to the deadline, trial counsel fully investigated the defense of battered wife syndrome, including personally consulting with Dr. Marilyn Hutchinson, a psychologist from Kansas City, Missouri, and providing information to her concerning the petitioner's case. Unfortunately, the psychologist did not commit to serve as an expert witness in the petitioner's trial until after the deadline for disclosure of expert witnesses had passed. Indeed, trial counsel did not receive Dr. Hutchinson's written report until approximately ten days prior to trial. As soon as counsel obtained a commitment from Dr. Hutchinson and received the written report, he provided both the report and Dr. Hutchinson's name and telephone number to the prosecution and further instructed Dr. Hutchinson to discuss her proposed testimony with the prosecution. Moreover, defense counsel obtained a transcript of Dr. Hutchinson's testimony at a prior trial and provided the transcript to the prosecution. Nevertheless, the trial court ruled that the psychologist would not be permitted to testify on the petitioner's behalf. The trial court based its ruling upon the late commitment of the psychologist. According to trial counsel, the trial court also indicated that Dr. Hutchinson's testimony was not relevant in light of the petitioner's separation from her husband at the time of the offense. For purposes of appeal, trial counsel submitted to the trial court an affidavit by Dr. Hutchinson concerning the contents of her proposed testimony. In the affidavit, Dr. Hutchinson concluded that, at the time of the murder, the petitioner was suffering from post-traumatic stress disorder due to her husband's abuse and was temporarily insane.

This court accords great deference to the strategy and tactics employed by a defendant's attorney. State v. Gurley, 919 S.W.2d 635, 638 (Tenn. Crim. App. 1995). Generally, therefore, this court will not second guess counsel's choice of a defense strategy, including decisions relating to the use of the battered wife syndrome. Id. The attorney is, however, required to make decisions of strategy and tactics in an informed manner with adequate preparation. Henley, 960 S.W.2d at 579. The record in this case reflects that counsel, in fact, adequately investigated the defense of battered wife syndrome. However, the petitioner further argues that his trial counsel should have requested a continuance of her trial when it became apparent that counsel would not receive a commitment from Dr. Hutchinson before the deadline imposed by the trial court and further should have submitted Dr. Hutchinson's live testimony to the trial court in support of a motion for a continuance and for purposes of subsequent appeals.

Trial counsel testified at the post-conviction hearing that Dr. Hutchinson's testimony might "conceivably" have been helpful in establishing the petitioner's insanity at the time of the murder. However, trial counsel *did* call as witnesses Dr. Tom Billiard, a psychologist, and Dr. Ruth Peachy, a psychiatrist, who testified that the petitioner was insane at the time of the murder due to protracted abuse by her husband. Additionally, several lay witnesses opined that the petitioner was

insane. Trial counsel acknowledged that the defense of battered wife syndrome is also used in conjunction with a defense of self-defense. However, "one who is diagnosed as suffering from battered spouse syndrome [is not] automatically entitled to an acquittal on the basis of self-defense or defense of others." State v. Smith, No. 01C01-9211-CC-000362, 1995 WL 89060, at *5 (Tenn. Crim. App. at Nashville, March 2, 1995). In other words, the evidence adduced at trial would still have had to relate to a well-grounded belief by the petitioner that there was an imminent danger of death or serious bodily injury *at the time of the killing*. Id. See generally State v. Leaphart, 673 S.W.2d 870, 873(Tenn. Crim. App. 1983)(citing State v. Wilson, 556 S.W.2d 232, 234 (Tenn. 1977)). Cf. Tenn. Code Ann. § 39-11-611 (first enacted in 1989 and codifying much of the common law doctrine of self-defense). Accordingly, we cannot conclude that trial counsel rendered deficient performance by declining to pursue a continuance nor are we able to conclude that there is a reasonable probability that the result of the proceeding would have been different had Dr. Hutchinson testified. Finally, counsel adequately preserved this issue for appeal by submitting Dr. Hutchinson's affidavit. The thirteen page affidavit outlines in great detail Dr. Hutchinson's evaluation of the petitioner. The petitioner does not state what additional facts would have been revealed through Dr. Hutchinson's live testimony. This issue is without merit.

The petitioner also alleges that counsel was ineffective due to his failure to call witnesses to rebut the testimony of the petitioner's daughter conceming incriminating statements made by the petitioner or, alternatively, recall the petitioner's daughter to the witness stand. Specifically, the petitioner asserts that counsel should have called as witnesses several individuals who allegedly overheard the daughter admit that she had committed perjury on behalf of the State. However, counsel testified at the post-conviction hearing that the jury had already begun deliberations when he was advised concerning the possibility of perjured testimony. He asserted that, had he been notified earlier concerning the daughter's admission of perjury, he would have at a minimum recalled the daughter to the witness stand. Because he was notified during jury deliberations, counsel instead prepared and submitted to the trial court sworn affidavits by those individuals who overheard the daughter's admission. Finally, counsel testified at the post-conviction hearing that both the petitioner and possibly another daughter did testify at trial and denied that the petitioner had made the incriminating statements. We conclude that the petitioner has failed to establish that counsel rendered constitutionally ineffective assistance in this regard. This issue is without merit.

IV. Conclusion

In conclusion, we note that the petitioner's mental state was the key issue at trial. Petitioner introduced evidence of repeated and severe abuse over a long period of time. Additionally, two experts testified in support of the petitioner's claim of temporary insanity. The jury rejected her defense. We are unable to conclude that this result was caused by any deficiency of trial counsel.

For the foregoing reasons, we affirm the judgment of the post-conviction court.